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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 36.

DUKE LEE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

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Opinion Below.

No opinion was rendered in the District Court and the brief opinion of the United States Court of Appeals for the First Circuit is printed in the record (R. 41, 42).

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on November 10, 1965, and the jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Can a federal officer avoid the necessity of obtaining a search warrant and gain entrance to the *home* of one suspected of a crime by disguising himself and gaining entrance by means of stealth, fraud and deception for the

purpose of soliciting a crime and obtaining evidence to be used against the owner?

2. Is the Fourth Amendment to the Constitution of the United States violated when a federal officer, without a search warrant, disguises himself and gains entrance to the *home* of one suspected of a crime by means of stealth, fraud and deception for the purpose of soliciting a crime and obtaining evidence and does so?

3. Should the petitioner's motion to suppress evidence have been allowed?

4. Did the Court of Appeals for the First Circuit err in affirming the judgment of the District Court?

Constitutional Provisions Involved.

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of Case.

The petitioner stands convicted on two counts of violating Title 26, U.S.C., § 4742(a), of the Narcotics Law involving the transfer of marihuana.

Eleven days prior to the trial a hearing was held on the petitioner's motion to suppress the only evidence obtained by the government and used at his trial (R. 4, 5). At the hearing on said motion the testimony showed that on De-

cember 3, 1964, a federal narcotics agent, disguised and posing as a restaurant operator from Rhode Island known as "Jimmy the Pollock" (R. 8, 11), made a telephone call to the home of the petitioner for the purpose of arranging to purchase a quantity of marihuana from him in his home (R. 7, 8); that the agent, *so disguised and by stealth and without a search warrant, entered the home* of the petitioner on December 3, 1964 (and again by the same method on December 17, 1964), *for the purpose of soliciting this crime* and to *obtain evidence,* which he did, *which* evidence *was used against him* at the time of his trial (R. 7, 8, 9, 10); that the agent did these things after suspecting the petitioner of such conduct for over a year prior to December 3, 1964 (R. 7, 8); that the petitioner was not arrested until four months later (April 27, 1965, R. 10); and that, prior to going to the home of the petitioner, the agent had personal knowledge and other information that a transfer would probably take place at the home of the petitioner (R. 8).

The pertinent testimony of the undercover agent on direct examination went as follows:

> "Q. At some time during your investigation prior to the arrest of Mr. Lewis did the defendant Mr. Lewis become a suspect?
>
> "A. Yes, he did.
>
> "Q. Can you tell us when in time that was, Mr. Cass?
>
> "A. Yes, sir. It began in 1963." (R. 7.)
>
> . . . . . .
>
> "Q. On or about Thursday, December 3d, 1964, as alleged in the indictment, did you communicate by telephone with the defendant prior to going to his home?
>
> "A. On December 3d?

"Q. Yes.

"A. Yes, sir, I did." (R. 7.)

. . . . . .

"Q. Was the purpose of your telephone call on this date, sir, to inquire about the purchase of a quantity of marihuana?

"A. It was.

"Q. On said date, December 3d and December 17th, 1964, Mr. Cass, did you pose as someone other than the federal officer that you are?

"A. I did.

"Q. And whether or not you represented yourself to the defendant on those occasions that you were one Pollock, operating a bar and grille, perhaps, in Rhode Island?

"A. That's correct." (R. 8.)

. . . . . .

"Q. When you went to the defendant's home on December 3d and December 17th, 1964, Mr. Cass, did you have a search warrant for that purpose?

"A. I did not.

"Q. At the time you went to the defendant's home on December 3d, 1964, did you suspect, from information you had received prior thereto or based on your own personal knowledge or otherwise, that a transaction might take place at the home of the defendant so far as the transfer of marihuana is concerned?

"A. I did.

"Q. When you went to the home of the defendant on December 3d and on December 17th, Mr. Cass, did you not go there for the purpose of obtaining narcotics from him?

"A. I did." (R. 8.)

. . . . . .

"Q. On or about Thursday, December 17th, 1964, prior to going to the home of the defendant did you communicate with him by telephone?

"A. I did.

"Q. And was this communication also concerning the possibility of procuring some marihuana from the defendant?

"A. It was.

"Q. When you went to the defendant's home the second time, Mr. Cass, on December 17th, 1964, did you not have enough evidence to arrest him at that particular time and charge him with the same crime for which he is charged today?

"A. I did." (R. 9.)

. . . . . .

"Q. When you went to the defendant's home the second time on December 17th, 1964 did you advise him of his right to have counsel before he answered any questions or entered into any conversation with you?

"A. On the 17th?

"Q. Yes.

"A. No, sir, I did not.

"Q. And on either visit, either the visit of December 3d or December 17th, did you advise the defendant of any of his constitutional rights insofar as they related to the matters with which he is charged today?

"A. I did not.

"Q. When, to the best of your recollection, after December 17th, 1964 did you arrest the defendant?

"A. On the 27th of April, 1965." (R. 9, 10.)

At the conclusion of the hearing the motion to suppress evidence was denied (R. 15) and the motion was renewed at the commencement of the trial, eleven days later, and

again denied after the conclusion of the trial that same day (R. 15, 16). The evidence was not in dispute, the defendant was found guilty, sentenced accordingly (R. 16, 17), and the only question presented here is whether the evidence was obtained in violation of the Fourth Amendment.

The judgment was appealed to the United States Court of Appeals for the First Circuit and was affirmed (R. 42).

Argument.

I.

The petitioner urges that this case falls squarely within the scope and prohibition of *Gouled* v. *United States,* 255 U.S. 298 (1921), which holds that entry into the home procured by stealth or deception to obtain evidence falls within the prohibition of the Fourth Amendment and which case has been updated by citation in recent decisions of this court—*Ker* v. *California,* 374 U.S. 23 (1963), and *Lopez* v. *United States,* 373 U.S. 427 (1963), to mention but a few.

It is interesting to note that the Commonwealth of Massachusetts recognized and followed the law of *Gouled* in *United States* v. *Reckis,* 119 F. Supp. 687 (1954).

There is no dispute that the entrance into the petitioner's home was gained by "stealth," as that term was used in the *Gouled* case (where a government officer entered the defendant's office in the guise of a business caller), as it was in the *Reckis* case (where the government officer entered onto the defendant's land in the guise of a fellow employee and said "the boss sent me down to fix the still"), as it was in *United States* v. *Cook,* 213 F. Supp. 568 (D.C. Tenn., 1962) (where the government officer entered onto the defendant's land by hiding in the trunk of an automobile), and as it was in *Gatewood* v. *United States,* 209 F. 2d 789 (1953) (where the government officers gained entrance

to the defendant's apartment by stating they were from "Western Union").

In each instance the courts have based their decisions on the invasion of the privacy of the home without a proper warrant for such a purpose, and have held this to be a violation of the Fourth Amendment. In no instance can it be said that any invitation by the defendants in the above cases under such deceptive circumstances constituted a waiver of any of their rights under the Fourth Amendment. The petitioner could not improve on the language of these decisions, and urges this Court to continue to follow these cases and rule that the entry into the home of the petitioner as previously stated constituted a violation of his rights under the Fourth Amendment, and that the evidence so obtained should have been suppressed on his motion.

II.

Another line of argument which lends itself to this case deals with the doctrine that the right of privacy, especially in the "constitutionally protected area of the home" should not be invaded without a proper warrant unless the case falls into some exceptional situation of "urgent emergency." *McDonald* v. *United States,* 335 U.S. 451 (1948). *Johnson* v. *United States,* 333 U.S. 10 (1948). *Rios* v. *United States,* 364 U.S. 253 (1960). *Jones* v. *United States,* 362 U.S. 257 (1960). The court discusses some of these extreme instances, such as a situation where a shot is heard and is followed by a cry for help, or when in hot pursuit of a felon who seeks refuge into a home, or where the entrance and search accompanies a valid arrest. But none of these "extreme circumstances" are presented here, more especially where the petitioner has been a suspect for over a year prior to the entrance into his home by the agent (R. 7, 8).

The telephone call to the petitioner's home by the agent in this case is surely more remote in time and circumstance (so as to require a warrant) than the incident surrounding the entry made in *Johnson* v. *United States,* 333 U.S. 10 (1948), where the agent, detecting the smell of opium in the corridor, entered the premises and arrested the defendant without a warrant. Such action was held by this court to violate the Fourth Amendment.

III.

Still another approach to the question can be found in the class of case which holds that the determination as to *when* to invade the privacy of the home is to be separated from the law-enforcement agencies by a magistrate in order to prevent the merger of police power with the judiciary. Such a merger "would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson* v. *United States, supra,* p. 17.

The doctrine is again clearly spelled out by this court in *Jones* v. *United States,* 362 U.S. 257 (1960), wherein it was stated that, "In a doubtful case, when the officer does not have clearly convincing evidence . . . it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent *judicial officer,* whose decision, *not that of the police,* may govern whether liberty or privacy is to be invaded" (pp. 270-271).

Perhaps one of the most significant cases in this area is *Silverman* v. *United States,* 365 U.S. 505 (1961), the famous "spike mike" case, which "holds the line to a fraction of an inch," and clearly demonstrates the extent to which over-zealous law-enforcement officers can and will go if the line is not held. A concurring justice in the *Silverman* case stated that the "technique" of the invasion ought

to require a warrant, and the petitioner in the case at bar urges that this same requirement be established for the "Sneaky Pete Method" of gaining entrance to the home by stealth or deception.

If such an enlargement of police power occurs, then the People could never be certain that the postman, milkman, priest, rabbi or repairman, coming into the home or being met in the street, is not some government agent bent on spying into the privacy of the house or someone's personal affairs whenever and wherever such a meeting takes place.

What great distrust of the government this situation would create among the People!!

IV.

The petitioner realizes that in most instances this type of case must be decided on its own particular facts and further recognizes the long line of significant and controversial cases which have been decided since *Boyd* v. *United States,* 116 U.S. 616 (1886), relating to the question involving search and seizure.

The petitioner feels that it is proper for an undercover agent to pursue the detection of crime without violating the constitutional rights of the citizen, but finds it most untenable, as in this case, where the defendant is sought out in the first instance by a government agent, then tricked in violation of his constitutional rights, solicited and subsequently prosecuted for a crime which the government agent originated and in which he participated in equal measure, and tried with the ill-gotten evidence.

V.

Finally, the petitioner wishes to point out that *United States* v. *Pasquinzo,* 334 F. 2d 74 (1964), relied upon by the Court of Appeals, is distinguishable here in that the place

of purchase in *Pasquinzo* was a drugstore, open to the public, and not in the home of the defendant as in the case at bar, and therefore feels that the Court of Appeals erred in relying thereon.

Conclusion.

For reasons stated above, the petitioner urges that the judgment of the Court of Appeals be reversed.

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